

OVERVIEW

THE AMERICANS WITH DISABILITIES ACT

OF 1990

TITLE I - EMPLOYMENT

Prepared by:

**State of Nevada
Department of Personnel
Technical Services Division
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I. SUMMARY

The Americans with Disabilities Act (ADA) is a federal antidiscrimination statute designed to remove barriers which prevent qualified individuals with disabilities from enjoying the same employment opportunities available to persons without disabilities.

Like the Civil Rights Act of 1964 that prohibits discrimination on the bases of race, color, religion, national origin, and sex the ADA seeks to ensure access to equal employment opportunities based on merit. It does not guarantee equal results, establish quotas, or require preferences favoring individuals with disabilities over those without disabilities.

However, while the Civil Rights Act of 1964 prohibits any consideration of personal characteristics such as race or national origin, the ADA necessarily takes a different approach. When an individual's disability creates a barrier to employment opportunities, the ADA requires employers to consider whether reasonable accommodation could remove the barrier.

The ADA thus establishes a process in which the employer must assess a disabled individual's ability to perform the essential functions of the specific job held or desired. While the ADA focuses on eradicating barriers, the ADA does not relieve a disabled employee or applicant from the obligation to perform the essential functions of the job. To the contrary, the ADA is intended to enable disabled persons to compete in the work place based on the same performance standards and requirements that employers expect of persons who are not disabled.

However, where that individual's functional limitation impedes such job performance, an employer must take steps to reasonably accommodate, and thus help overcome the particular impediment, unless to do so would impose an undue hardship. Such accommodations usually take the form of adjustments to the way a job customarily is performed, or the work environment itself.

This process of identifying whether, and to what extent, a reasonable accommodation is required should be flexible and involve both the employer and the individual with a disability. Of course, the determination of whether an individual is qualified for a particular position must necessarily be made on a case-by basis. No specific form of accommodation is guaranteed for all individuals with a particular disability. Rather, an accommodation must be tailored to match the needs of the disabled individual with the needs of the job's essential functions.

This handbook is not a substitute for legal advice and is subject to change without notice. If you need specific information regarding the ADA, consult your agency's ADA Coordinator, deputy attorney general, or State and federal enforcement and technical assistance agencies.

II. DEFINITIONS

Disability

An individual must satisfy at least one of these three parts in order to be considered an individual with a disability:

- (1) has a physical or mental impairment which substantially limits one or more of that person's major life activities; or
- (2) has a record of such an impairment; or
- (3) is regarded by the covered entity as having such an impairment.

Physical or Mental Impairment

According to the EEOC regulations, a physical or mental impairment means a physiological disorder or condition, cosmetic disfigurement, or anatomical loss affecting one or more of several body systems, or a mental or psychological disorder, such as mental retardation, organic brain syndrome, emotional or mental illness, and specific learning disabilities.

The U.S. Supreme Court ruled June 22, 1999, in *Sutton v. United Airlines*, *Murphy v. United Parcel Service*; and *Albertsons, Inc., v. Kirkingburg* that individuals whose conditions are controlled by modified behaviors, taking medicine or using corrective devices or equipment may not have disabilities covered by the ADA. The determination of whether a person has a "disability" must be made on a case-by-case basis. The Court stated that it could not be assumed that everyone with a particular type of impairment who uses a particular mitigating measure automatically was included – or – excluded from the ADA's definition of disability. Nor does the definition of "disability" depend on general information about the limitations of an impairment. Rather, one must assess the specific limitations, or lack of limitations, experienced by a person who uses a mitigating measure or compensating behavior to lessen or eliminate the limitations caused by the impairment.

The definition of the term "impairment" does not include physical characteristics such as eye color, hair color, left-handedness, or height, weight or muscle tone that are within "normal" range and are not the result of a physiological disorder. Similarly, the definition does not include common personality traits such as poor judgment or a quick temper where there are not symptoms of a mental or psychological disorder. Environmental, cultural, or economic disadvantages such as poverty, lack of education or a prison record are not impairments. Advanced age, in and of itself, is also not an impairment.

Substantially Limiting Condition

An impairment rises to the level of disability if the impairment substantially limits one or more of the individual's major life activities. The term "substantially limits" means:

- (1) Unable to perform a major life activity that the average person in the general population can perform; or

- (2) Significantly restricted as to the condition, manner or duration under which an individual can perform a particular major life activity as compared to the condition, manner, or duration under which the average person in the general population can perform that same major life activity.

The determination of whether an individual has a disability is not necessarily based on the name or diagnosis of the impairment the person has, but rather on the effect of that impairment on the life of the individual. Some impairments may be disabling for particular individuals but not for others, depending on the stage of the disease or disorder, the presence of other impairments that combine to make the impairment disabling or any number of other factors.

Major Life Activities

Major life activities are defined as the basic activities the average person in the general population can perform with little or no difficulty. Major life activities include caring for oneself, performing manual tasks, walking, seeing, hearing, speaking, breathing, learning, and working. This list is not exhaustive.

Qualified Individual with a Disability

A qualified individual with a disability "satisfies the requisite skill, experience and education requirements of the employment position" the individual holds or desires.

Essential and Marginal Functions

A job typically includes both essential and non-essential (or marginal) functions. In general, the term "essential functions" means the fundamental job duties of the employment position. If the essential functions are the "musts," the non-essential functions are the "also to be done's." NAC 284.356 outlines the areas which must be considered when determining which functions are essential.

Reasonable (effective) Accommodation

Reasonable accommodations are any change or adjustment to a job or work environment that permits a qualified applicant or employee with a disability to participate in the job application process, to perform the essential functions of a job, or enjoy the benefits and privileges of employment equal to those enjoyed by the employees without disabilities.

Undue Hardship

The term "undue hardship" means significant difficulty or expense in, or resulting from, the provision of the accommodation. "Undue hardship" refers to any accommodation that would be unduly costly, extensive, substantial, or disruptive, or that would fundamentally alter the nature or operation of the business. When determining whether the expense of an accommodation would be an undue hardship, the full resources of the State must be considered.

Direct Threat

The term "direct threat" means significant risk of substantial harm to the health or safety of others that cannot be eliminated or reduced by reasonable accommodation. In determining whether an individual with a disability poses a direct threat, including an individual with a contagious disease, the factors to be considered include:

- (1) the duration of the risk;
- (2) the nature and severity of the potential harm;
- (3) the likelihood that the potential harm will occur; and
- (4) the imminence of the potential harm.

The key here is to obtain individualized medical information about the limitations that are posed by this worker's disability and the probable harm that this individual's specific physical or psychological problems will pose for the position in question.

Specific Exclusions

The term disability does not include:

- (1) Transvestism, transsexualism, pedophilia, exhibitionism, voyeurism, gender identity disorders not resulting from physical impairments, or other sexual behavior disorders;
- (2) Compulsive gambling, kleptomania, or pyromania;
- (3) Psychoactive substance use disorders resulting from current illegal use of drugs.

For purposes of the definition of "disability", homosexuality and bisexuality are not impairments and as such are not disabilities under this act.

Substance Abuse

The terms disability and qualified individual with a disability do not include individuals currently engaging in the illegal use of drugs, when the covered entity acts on the basis of such use:

- (1) Drug means a controlled substance, as defined in schedules I through V of Section 202 of the Controlled Substances Act.
- (2) Illegal use of drugs means the use of drugs of which the possession or distribution of which is unlawful under the Controlled Substances Act. This term does not include the use of a drug taken under the supervision of a licensed health care professional, or other uses authorized by the Controlled Substances Act or other provision of Federal Law.

III. EMPLOYMENT PROCESS

Scope and Effect

The law covers a full range of employment activities, including:

- job application and recruiting procedures
- hiring and discharge
- employee compensation and fringe benefits
- job assignment
- advancement
- annual and sick leave (or other types of leave)
- job training
- social and recreational activities
- other terms, conditions and privileges of employment

Discrimination in Employment

The term "discrimination" under Title I of the ADA includes limiting, segregating or classifying in any way the opportunity or status of a job applicant or employee because of that person's disability.

Affirmative Action Not Required

No part of the ADA requires employers to take *affirmative action* in employing people with disabilities, i.e., employers are not required to recruit, hire and promote those with disabilities as part of a mandate to make their work force more diverse. Rather, the ADA requires employers to modify their hiring processes and employment practices so discrimination does not occur when a disabled person applies for a job or is hired.

However, the ADA does not invalidate Section 503 of the Rehabilitation Act which requires federal (sub)contractors with (sub)contracts of \$10,000 or more per year to take affirmative action in hiring and promoting individuals with disabilities.

Essential Functions

The determination of which functions are essential may be critical to the determination of whether or not the individual with a disability is qualified. The essential functions are those functions that the individual who holds the position must be able to perform unaided or with the assistance of a reasonable (effective) accommodation.

The Rules for State Personnel Administration (NAC 284.356) provide that an appointing authority shall determine the essential functions of a position on a case-by-case basis, and the areas which must be considered when determining the essential functions of a position. In Section VI, a sample form and procedure are provided which may be used to establish essential functions.

Qualification Standards, Tests, and Other Selection Criteria

It is unlawful for a covered entity to use qualification standards, employment tests or other selection criteria that screen out or tend to screen out an individual with disability or a class of individuals with disabilities, on the basis of disability, unless the standard, test or other selection criteria, as used by the covered entity, is shown to be job-related for the position in question and is consistent with business necessity. This provision is applicable to all types of selection criteria, including safety requirements, vision or hearing requirements, walking requirements, lifting requirements, and employment tests. Legitimate production standards will generally not be subject to a challenge under this provision.

An employer may give a *physical agility test* to determine physical qualifications necessary for certain jobs prior to making a job offer if it is simply an agility test and not a medical examination. Such a test would not be subject to the prohibition against pre-employment medical examinations if given to all similarly situated applicants or employees, regardless of disability. However, if an agility test screens out or tends to screen out an individual with a disability or a class of such individuals because of disabling conditions, the employer must be prepared to show that the test is job-related and consistent with business necessity and that the test or the job cannot be performed with a reasonable accommodation.

Tests for illegal use of drugs are not medical examinations under the ADA and are not subject to the restrictions on such examinations.

Selection Process

It is the employer's responsibility to select the most qualified candidate for a position. The ADA only makes it unlawful to discriminate against a qualified individual with a disability on the basis of disability. Employers must determine whether or not an individual with a disability is qualified at the time of the hiring decision, based on the person's present capabilities. Employers should not make decisions based on speculation about what may happen in the future or concerns about increased insurance premiums or workers' compensation costs.

An employer cannot inquire as to whether an individual has a disability at the *pre-offer* stage of the selection process. Nor can an employer inquire at the pre-offer stage about an applicant's workers' compensation history. Employers may ask questions that relate to the applicant's ability to perform job-related functions. However, these questions should not be phrased in terms of disability. An employer may ask an applicant to describe or to demonstrate how, with or without reasonable accommodation, the applicant will be able to perform job-related functions. Such a request may be made of all applicants in the same job category regardless of disability. Such a request may also be made of an applicant whose known disability may interfere with or prevent the performance of a job-related function, whether or not the employer makes such a request of all applicants in the job category. Employers, though, may not refuse to hire an applicant with a disability because the applicant's disability prevents him or her from performing marginal functions.

The Rules for Personnel Administration (NAC 284.357) require the appointing authority to provide a description of the essential functions of the position to each candidate who is being considered for a vacant position. The information must be provided in a timely manner to allow a candidate with a disability to determine his need for reasonable accommodation. In addition, the appointing authority shall consider the essential functions of the position that have been identified pursuant to NAC 284.356 when determining which candidate will be offered employment. If the disability of a candidate prevents or impedes the performance of one or more functions of the position that are not identified as essential, the appointing authority shall not consider those functions when determining which candidate will be offered employment.

An employer may condition a job offer on the satisfactory result of a *pre-employment, post-offer* medical examination or medical inquiry if this is required of all entering employees in the same job category. A *pre-employment, post-offer* examination or inquiry does not have to be "job-related" and consistent with business necessity. Questions also may be asked about previous injuries and workers' compensation claims.

If an individual is not hired because a *pre-employment, post-offer* medical examination or inquiry reveals a disability, the reason(s) for not hiring must be job-related and necessary for the business. The employer also must show that no reasonable accommodation was available that would enable this individual to perform the essential job functions or that accommodation would impose an undue hardship.

A *pre-employment, post-offer* medical examination may disqualify an individual who would pose a "direct threat" to health or safety. Such a disqualification is job-related and consistent with business necessity.

A *pre-employment, post-offer* medical examination may not disqualify an individual with a disability who is currently able to perform the essential job functions because of speculation that the disability may cause a risk of future disability.

Employee medical examinations and inquiries, after a person starts work, medical examination and inquiries must be job related and necessary for the business. Employers may conduct employee medical examinations where there is evidence of a job performance or safety problem, examinations required by other federal laws, examinations to determine current "fitness" to perform a particular job, and voluntary examinations that are part of employee health programs.

Confidentiality and Record Keeping

Although the ADA does not limit the nature or extent of *post-offer, pre-employment* medical examinations and inquiries, it imposes very strict limitations on the use of information obtained from such examinations and inquiries. These limitations also apply to information obtained from examinations or inquiries of employees.

All information obtained from medical examinations and inquiries must be collected and maintained on separate forms, in separate secure medical files and must be treated as a confidential medical record as per NAC 284.726.

All medical-related information must be kept confidential, with the following exceptions:

- Supervisors and managers may be informed about necessary restrictions on the work or duties of an employee and necessary accommodations;
- First aid and safety personnel may be informed, when appropriate, if the disability might require emergency treatment or if any specific procedures are needed in the case of fire or other evacuations.
- Government officials investigating compliance with the ADA and other federal and State laws prohibiting discrimination on the basis of disability.
- Relevant information may be provided to state workers' compensation offices or "second injury" funds, in accordance with state workers' compensation laws.
- Relevant information may be provided to insurance companies where the company requires a medical examination to provide health or life insurance for employees.

A supervisor may not disclose to an employee's coworkers that s/he is receiving a reasonable accommodation because this usually amounts to a disclosure that the individual has a disability. The ADA specifically prohibits the disclosure of medical information except in limited situations, which do not include to coworkers.

A supervisor may respond to a question from an employee about why a coworker is receiving what is perceived as "different" or "special" treatment by emphasizing its policy of assisting any employee who encounters difficulties in the workplace. The supervisor also may find it helpful to point out that many of the workplace issues encountered by employees are personal, and that, in these circumstances, it is the employer's policy to respect employee privacy. An employer may be able to make this point effectively by reassuring the employee asking the question that his/her privacy would similarly be respected if s/he found it necessary to ask the employer for some kind of workplace change for personal reasons.

As long as there is no coercion by the employer, an employee with a disability may voluntarily choose to disclose to coworkers his/her disability and/or the fact that s/he is receiving a reasonable accommodation.

Posting Notice

The ADA requires that employers post a notice describing the provisions of the ADA. It must be made accessible, as needed, to individuals with disabilities. A poster is available from the Equal Employment Opportunity Commission (EEOC) summarizing the requirements of the ADA and other Federal legal requirements for nondiscrimination for which EEOC has enforcement responsibility. EEOC also provides guidance on making this information available in accessible formats for people with disabilities.

The Accommodation Process

The ADA requires employers to provide reasonable accommodations so that employees with disabilities can enjoy the “benefits and privileges of employment” equal to those enjoyed by similarly situated employees without disabilities.

The term "reasonable accommodation" may include:

- (A) making existing facilities used by employees readily accessible to and usable by individuals with disabilities; and
- (B) job restructuring, part-time or modified work schedules, reassignment to a vacant position, acquisition or modification of equipment or devices, appropriate adjustment or modifications of examinations, training materials or policies, the provision of qualified readers or interpreters, and other similar accommodations for individuals with disabilities.

Other benefits and privileges of employment include, but are not limited to, employer-sponsored: (1) training, (2) services (e.g., employee assistance programs, credit unions, cafeterias, lounges, gymnasiums, auditoriums, transportation), and (3) parties or other social functions (e.g., parties to celebrate retirements and birthdays, and company outings).

The ADA provides that an employer cannot require a qualified individual with a disability to accept an accommodation that is neither requested nor needed by the individual. However, if a necessary reasonable accommodation is refused, the individual may be considered not qualified.

The reasonable accommodation requirement is best understood as a means by which barriers to the equal employment opportunity of an individual with a disability are removed or alleviated. These barriers may, for example, be physical or structural obstacles that inhibit or prevent the access of an individual with a disability to job sites, facilities or equipment. Or they may be rigid work schedules that permit no flexibility as to when work is performed or when breaks may be taken, or inflexible job procedures that unduly limit the modes of communication that are used on the job, or the way in which particular tasks are accomplished.

The Applicant or Employee's Role in Requesting Accommodation

An individual with a disability should request a reasonable accommodation when s/he knows that there is a workplace barrier that is preventing him/her, due to a disability, from effectively competing for a position, performing a job, or gaining equal access to a benefit of employment. As a practical matter, it may be in an employee's interest to request a reasonable accommodation before performance suffers or conduct problems occur.

Employers are obligated to make reasonable accommodation only to the physical or mental limitations resulting from the disability of a qualified individual with a disability that are *known* to the employer. Thus, an employer would not be expected to accommodate disabilities of which it is unaware. If an employee with a known disability is having difficulty performing his or her job, an employer may inquire whether the employee is in need of a reasonable accommodation. In general, however, it is

the responsibility of the individual with a disability to inform the employer that an accommodation is needed.

When an individual decides to request accommodation, the individual or his/her representative (family member, friend, health professional, or other representative) must let the employer know that s/he needs an adjustment or change at work for a reason related to a medical condition. To request accommodation, an individual may use "plain English" and need not mention the ADA or use the phrase "reasonable accommodation". Requests for reasonable accommodation do not need to be in writing. Individuals may request accommodation in conversation or may use any other mode of communication. An employer may choose to write a memorandum or letter confirming the individual's request. Alternatively, an employer may ask the individual to fill out a form or submit the request in written form, but the employer cannot ignore the initial request. In Section VI. Forms and Notice, a sample accommodation request letter is provided.

An employer also may request reasonable documentation that the individual has an ADA disability and needs a reasonable accommodation. An employer cannot ask for documentation when: (1) both the disability and the need for reasonable accommodation are obvious, or (2) the individual has already provided the employer with sufficient information to substantiate that s/he has an ADA disability and needs the reasonable accommodation requested.

The Doctor's Role

A medical examination may be required if an employee requests an accommodation on the basis of disability. An accommodation may be needed in an employee's existing job, or if the employee is being transferred or promoted to a different job. Medical information may be needed to determine if the employee has a disability covered by the ADA and is entitled to an accommodation, and if so, to help identify an effective accommodation.

A doctor who conducts medical examinations for an employer should not be responsible for making employment decisions or deciding whether or not it is possible to make a reasonable accommodation for a person with a disability. That responsibility lies with the employer.

The doctor's role should be limited to advising the employer about an individual's functional abilities and limitations in relation to job functions, and about whether the individual meets the employer's health and safety requirements.

Accordingly, employers should provide doctors who conduct such examinations with specific information about the job, including the positions essential functions, work performance standards and other related materials which describe the duties assigned to the position.

The employer should inform the doctor that any recommendations or conclusions related to hiring or placement of an individual should focus on:

- Whether this person currently is able to perform this specific job, with or without an accommodation.

- Whether this person can perform this job without posing a "direct threat" to the health or safety of others.

Where the doctor's report indicates that an individual has a disability that may prevent performance of essential job functions, or that may pose a "direct threat" to health or safety, the employer also may seek his/her advice on possible accommodations that would overcome these disqualifications.

Second Opinion

The ADA does not prevent an employer from requiring an individual to go to an appropriate health professional of the employer's choice if the individual provides insufficient information from his/her treating physician (or other health care professional) to substantiate that s/he has an ADA disability and needs a reasonable accommodation. However, if an individual provides insufficient documentation in response to the employer's initial request, the employer should explain why the documentation is insufficient and allow the individual an opportunity to provide the missing information in a timely manner. Documentation is insufficient if it does not specify the existence of an ADA disability and explain the need for reasonable accommodation.

Any medical examination conducted by the employer's health professional must be job-related and consistent with business necessity. This means that the examination must be limited to determining the existence of an ADA disability and the functional limitations that require reasonable accommodation. If an employer requires an employee to go to a health professional of the employer's choice, the employer must pay all costs associated with the visit(s). State personnel regulations provide a procedure for obtaining a second and third medical opinion. (NAC 284.566)

Determining the Appropriate Reasonable Accommodation

When a qualified individual with a disability has requested a reasonable accommodation to assist in the performance of a job, the employer should:

- (1) analyze the particular job involved and determine its purpose and essential functions;
- (2) consult with the individual with a disability to ascertain the precise job-related limitations imposed by the individual's disability and how those limitations could be overcome with a reasonable accommodation;
- (3) in consultation with the individual to be accommodated, identify potential accommodations and assess the effectiveness each would have in enabling the individual to perform the essential functions of the position; and
- (4) consider the preference of the individual to be accommodated and select and implement the accommodation that is most appropriate for both the employee and the employer.

If consultation with the individual in need of the accommodation still does not reveal potential appropriate accommodations, then the employer, as part of this process, may find that technical assistance is helpful in determining how to accommodate the particular individual in the specific situation. Such assistance could be sought from State or local rehabilitation agencies, the Job Accommodation Network, disability constituent organizations, the Internet, and other public and

private providers. Effective accommodations should be considered on a case-by-case basis and do not set precedent for others in the work environment.

Vocational Rehabilitation

Vocational Rehabilitation is a State and federally funded program to help eligible people with disabilities get or keep a job. As appropriate to the vocational rehabilitation needs of each client and consistent with the individual's informed choice, vocational rehabilitation provides assessment and evaluation, counseling and guidance, training, interpreter, and other goods and services to employ and retain qualified individuals with disabilities.

Job Restructuring

Job restructuring is a common way to accommodate qualified individuals with disabilities who can perform some parts of a job, but not others. The concept is based on identifying the non-essential functions of the job that counteract with a person's disability and attempting to eliminate them. Some examples of job restructuring include:

- *Adopting flexible leave and attendance policies.* An employee who has difficulty getting to work in the morning because of her disability might be allowed to arrive later and finish her day later (as long as essential part of the employer's day is covered). The employee who is unable to drive at night might (such as someone with poor night vision) be assigned day-shift work.
- *Reassigning work at the existing site among co-workers.* If a secretary had a vision impairment that prevented her from typing in small spaces on forms, whenever such forms needed to be prepared, they might be assigned to another secretary without a vision impairment. In exchange, the secretary with a disability could assume one of her colleague's duties, such as filing.
- *Eliminating non-essential tasks.* If a part of the job is not necessary, it could be eliminated entirely. A mail-clerk, rather than traveling to the post office in the early morning, might be allowed to wait for regular mail delivery.
- *Reassigning visits to accessible sites.* The repairman who uses a wheelchair could service the accessible sites, while the other sites could be assigned to someone who is not mobility-impaired.
- *Assigning uninterrupted work times for particular tasks.* Some people with learning disabilities have problems when their attention is interrupted. Merely scheduling uninterrupted work time might allow greater concentration and heighten performance of such an individual.
- *Designing procedures for task accomplishment.* Allowing work in other than the traditional office setting might be appropriate in some cases. For example, the outside

salesperson can make calls on a dedicated line from home instead of having to come regularly to an inaccessible office to make those calls.

Reassignment

The ADA specifically lists “reassignment to a vacant position” as a form of reasonable accommodation. This type of reasonable accommodation must be provided to an employee who, because of a disability, can no longer perform the essential functions of his/her current position, with or without reasonable accommodation, unless the employer can show that it would be an undue hardship.

An employee must be “qualified” for the new position. An employee is “qualified” for a position if s/he: (1) satisfies the requisite skill, experience, education, and other job-related requirements of the position, and (2) can perform the essential functions of the new position, with or without reasonable accommodation. The employee does not need to be the best qualified individual for the position in order to obtain it as a reassignment.

The employer must reassign the individual to a vacant position that is equivalent in terms of pay status, or other relevant factors (e.g., benefits, geographical location) if the employee is qualified for the position. If there is no vacant equivalent position, the employer must reassign the employee to a vacant lower level position for which the individual is qualified. Assuming there is more than one vacancy for which the employee is qualified, the employer must place the individual in the position that comes closest to the employee’s current position in terms of pay, status, etc. If it is unclear which position comes closest, the employer should consult with the employee about his/her preference before determining the position to which the employee will be reassigned. Reassignment does not include giving an employee a promotion. Thus, an employee must compete for any vacant position that would constitute a promotion.

700 Hour Law

The 700 Hour law allows qualified individuals with disabilities, who are eligible for temporary limited appointments of 700 hours’ duration, to be certified to lists used for selection of State employees. These lists are provided to State agencies along with other eligible candidates. Individuals certified to an eligible list as a 700 Hour client must meet the education and experience requirements of the classification.

Once employed, these 700 hours of work experience serve as the examination and are used to measure the client’s merit and fitness for the job. At the end of the appointment, if the client’s performance is satisfactory, s/he may continue in the position as a regular employee with the 700 hours counting toward the time required to earn permanent status.

A current probationary or permanent State employee who occupies a permanent full-time position is not eligible for the provisions of this section unless his disability jeopardizes his continued employment in his present position and placement on the list does not merely circumvent the

provisions of the Rules for Personnel Administration governing promotion or transfer. (NRS 284.327 and Rules for Personnel Administration NAC 284.364)

Refusing to Allow an Individual With a Disability to Return to Work

Employers cannot refuse to let an individual with a disability return to work on the basis that the employee is not fully recovered from injury, unless she or he:

- cannot perform the essential functions of the job she or he holds or desires with or without reasonable accommodation, or
- would pose a significant risk of substantial harm that could not be reduced to an acceptable level with reasonable accommodation (i.e., "direct threat").

Since reasonable accommodation may include reassignment to a vacant position, an employer may be required to consider an employee's qualifications to perform other vacant jobs for which she or he is qualified.

How to Pay for Accommodations

The cost of accommodations do vary, but the majority of accommodations can be provided at little or no cost.

Once the appropriate accommodation is identified, in consultation with the individual in need of the accommodation, State agencies should work with their assigned Budget Analyst to determine appropriate State funding sources.

In addition, the State Bureau of Vocational Rehabilitation and Bureau of Services to the Blind and Visually Impaired can usually provide financial assistance and accommodations for their clients. The U.S. Department of Veterans Affairs also provides financial assistance to disabled veterans for equipment needed to help perform jobs. Some organizations that serve people with particular types of disabilities also provide financial assistance for needed accommodations. Other types of assistance may be available in the community such as transportation services.

The applicant or employee also may be willing to share in the portion of the cost of the accommodation which is an *undue hardship* on the State or already own the equipment or assistive device necessary to perform the essential functions of the job.

Not Making Reasonable Accommodation

It is unlawful for a covered entity not to make reasonable accommodation to the known physical or mental limitations of an otherwise qualified applicant or employee with a disability, unless such covered entity can demonstrate that the accommodation would impose an undue hardship on the operation of its business.

Evaluations, Discipline and Conduct Standards

An employer can hold employees with disabilities to the same standards of production/performance as other similarly situated employees without disabilities for performing essential job functions (with or without reasonable accommodation).

An employer also can hold employees with disabilities to the same standards of production/performance as other employees regarding marginal job functions, unless the disability affects the ability to perform these marginal functions. If the ability to perform marginal functions is affected by the disability, the employer must provide some type of reasonable accommodation such as job restructuring (unless to do so would be an undue hardship).

An employer should not give employees with disabilities "special treatment." They should not be evaluated on a lower standard or disciplined less severely than any other employee.

If an employee with a disability is not performing well, an employer may require medical and other professional inquiries that are job-related and consistent with business necessity to discover whether the disability is causing the poor performance, and whether any reasonable accommodation or additional accommodation is needed.

An employer may not discipline or terminate an employee with a disability if the employer has refused to provide a requested reasonable accommodation that did not constitute an undue hardship, and the reason for unsatisfactory performance was the lack of accommodation.

An employer may discipline an individual with a disability for violating a work place conduct standard even if the misconduct resulted from a disability providing the work place standard is job-related for the position in question and is consistent with business necessity.

For example, nothing in the ADA prevents an employer from maintaining a work place free of violence or threats of violence, or from disciplining an employee who steals or destroys property. Thus, an employer may discipline an employee with a disability for engaging in such misconduct if it would impose the same discipline on an employee without a disability.

Other conduct standards, however, may not be job-related for the position in question and consistent with business necessity.

For example, an employee with a psychiatric disability works in a warehouse loading boxes onto pallets for shipment. He has no customer contact and does not come into regular contact with other employees. Over the course of several weeks, he has come to work appearing increasingly disheveled. His clothes are ill-fitting and often have tears in them. He also has become increasingly anti-social. Coworkers have complained that when they try to engage him in casual conversation, he walks away or gives a curt reply. When he has to talk to a coworker, he is abrupt and rude. His work, however, has not suffered. The employer's company handbook states that employees should

have a neat appearance at all times. The handbook also states that employees should be courteous to each other. When told that he is being disciplined for his appearance and treatment of coworkers, the employee explains that his appearance and demeanor have deteriorated because of his disability which was exacerbated during this time period.

The dress code and coworker courtesy rules are not job-related for the position in question and consistent with business necessity because this employee has no customer contact and does not come into regular contact with other employees. Therefore, rigid application of these rules to this employee would violate the ADA.

Illegal Use of Drugs

An employer may discharge or deny employment to current illegal users of drugs, on the basis of such drug use, without fear of being held liable for disability discrimination. Current illegal users of drugs are not "individuals with disabilities" under the ADA. Persons addicted to drugs, but who are no longer using drugs illegally and are receiving treatment for drug addiction or who have been rehabilitated successfully, are protected by the ADA from discrimination on the basis of past drug addiction.

Alcoholism

While a current illegal user of drugs has no protection under the ADA if the employer acts on the basis of such use, a person who currently uses alcohol is not automatically denied protection simply because of the alcohol use. An alcoholic is a person with a disability under the ADA and may be entitled to consideration of accommodation, if s/he is qualified to perform the essential functions of the job. However, an employer may discipline, discharge or deny employment to an alcoholic whose use of alcohol adversely affects job performance or conduct to the extent that s/he is not "qualified".

For example: If an individual is an alcoholic is often late to work or is unable to perform the responsibilities of his/her job, an employer can take disciplinary action on the basis of the poor job performance and conduct. However, an employer may not discipline an alcoholic employee more severely than it does other employees for the same performance or conduct.

Grievance Procedure

The first and optimal procedure for handling ADA issues is through open dialog between the employee, supervisor and when necessary the agency ADA Coordinator. A departmental ADA Grievance policy may be in place and which case may be used to resolve issues which have not been handled through an open dialog.

If this does not reach a satisfactory solution, Nevada Administrative Code suggests to employees a number of methods for reporting alleged discrimination.

NAC 284.696 Unlawful discrimination

1. An employee alleging unlawful discrimination based on any pertinent state or federal law or regulation may:
 - (a) Report the alleged discrimination to the attorney general, the employee's appointing authority, an equal employment opportunity officer or a personnel representative for corrective action;
 - (b) Use the procedure for the adjustment of a grievance contained in NAC 284.658 to 284.6957, inclusive; or
 - (c) File a complaint with the Nevada equal rights commission pursuant to NRS 613.405.
2. The appointing authority of an employee who has alleged unlawful discrimination shall promptly notify the deputy attorney general or staff counsel assigned to represent the agency of the allegation and the actions which are being undertaken to address the allegation. (Add to NAC by Dep't of Personnel, eff. 10-26-84; A 9-16-92; 11-16-95)

IV. FAMILY MEDICAL LEAVE ACT (FMLA) AND ADA

The FMLA and the ADA both require a covered employer to grant medical leave to an employee in certain circumstances. Under the ADA, unpaid leave is a reasonable accommodation and must be provided to an otherwise qualified individual with a disability unless (or until) it imposes an undue hardship on the operation of the employer's business.

Under the FMLA, an "eligible" employee may take up to 12 work weeks of leave during a rolling 12-month period for one or more of the following reasons:

- (1) The birth of a child, and to care for the newborn child;
- (2) The placement of a child with the employee through adoption or foster care, and to care for the child;
- (3) To care for the employee's spouse, son, daughter, or parent with a serious health condition; and
- (4) Because a serious health condition makes the employee unable to perform one or more of the essential functions of his or her job.

The words child, parent, care, serious health condition, continuing treatment, and health care provider have specific meaning under the FMLA and their definitions should be referred to when determining eligibility. An overview of the Family and Medical Leave Act and the Rules for Personnel Administration are available from the Department of Personnel website at www.state.nv.us/personnel.

During FMLA leave, an employer must maintain the employee's existing level of coverage under a group health plan. At the end of FMLA leave, an employer must take an employee back into the same or an equivalent job. An employee with a ADA disability who is granted leave as a reasonable accommodation is entitled to return to his/her same position unless the employer demonstrates that holding open the position would impose an undue hardship or an employee is no longer qualified to return to his/her original position. In which case, the employer must reassign the employee (absent undue hardship) to a vacant position for which s/he is qualified.

Not all employees protected by the ADA are entitled to leave under the FMLA. Employees protected by the ADA must be independently "eligible" for FMLA leave. "Eligibility" for FMLA leave depends on several factors, for example, length of service. Employees are "eligible" for FMLA leave if they: (1) have been employed by a "covered" employer for at least 12 months, which need not be consecutive; (2) had at least 1,250 hours of service during the 12-month period immediately before the leave started; and (3) are employed at a work site where the employer employs 50 or more employees within 75 miles.

An FMLA "serious health condition" is not necessarily an ADA "disability." An ADA "disability" is an impairment that substantially limits one or more major life activities, a record of such an impairment, or being regarded as having such an impairment.

Some FMLA "serious health conditions" may be ADA disabilities, for example, most cancers and serious strokes. Other "serious health conditions" may not be ADA disabilities, for example, normal pregnancy or a routine broken leg or hernia. This is because the condition is not an impairment (e.g., pregnancy), or because the impairment is not substantially limiting (e.g., a routine broken leg or hernia).

In addition, the fact that an individual has a record of a "serious health condition" does not necessarily mean that s/he has a record of an ADA disability. Under the ADA, an individual must have a record of a substantially limiting impairment in order to be covered.

Finally, just because someone has a "serious health condition" also does not mean that the employer regards him/her as having an ADA disability. To satisfy this prong of the ADA definition of "disability," the employer must treat the individual as having an impairment that substantially limits one or more major life activities.

Comparison of ADA and FMLA Leave

The limit of 12 workweeks of leave in a rolling 12-month period under FMLA does not mean that the ADA also limits employees to 12 weeks of leave per year. An otherwise qualified individual with a disability is entitled to more than 12 weeks of unpaid leave as a reasonable accommodation if the additional leave would not impose an undue hardship on the operation of the employer's business. To evaluate whether additional leave would impose an undue hardship, the employer may consider the impact on its operations caused by the employee's initial 12-week absence, along with the undue hardship factors specified in the ADA.

Under the ADA, a qualified individual with a disability may work part-time in his/her current position, or occasionally take time off, as a reasonable accommodation if it would not impose an undue hardship on the employer. If (or when) reduced hours create an undue hardship in the current position, the employer must see if there is a vacant, equivalent position for which the employee is qualified and to which the employee can be reassigned without undue hardship while working a reduced schedule. If an equivalent position is not available, the employer must look for a vacant

position at a lower level for which the employee is qualified. Continued accommodation is not required if a vacant position at a lower level is also unavailable.

The ADA does not prohibit an employer and an employee from agreeing on another mutually acceptable accommodation. For example, an employer and employee may agree to a transfer, on either a temporary or a permanent basis, if both parties believe that such a transfer is preferable to accommodating the employee in his/her current position. In some instances, an employee may request more leave under the ADA even after the employer has communicated that it cannot hold the employee's job open any longer (i.e., there is undue hardship). In this situation, the ADA-covered employer must see if it has a vacant, equivalent position for which the employee is qualified and to which the employee can be reassigned without undue hardship to continue his/her leave. If an equivalent position is not available, the employer must look for a vacant position at a lower level. Continued accommodation is not required if a vacant position at a lower level is also unavailable.

Under the FMLA, an "eligible" employee may take leave intermittently or on a part-time basis for his or her own "serious health condition" when medically necessary for treatment or recovery, until s/he has used up the equivalent of 12 workweeks in a rolling 12-month period. When such leave is foreseeable based on planned, medical treatment, an employer may require the employee to temporarily transfer (for the duration of the leave) to an available alternative position for which the employee is qualified and which better suits his/her reduced hours.

Medical Certification, Inquiries and Confidentiality

When an employee requests leave under the FMLA for a serious health condition, employers will not violate the ADA by asking for the information specified in the FMLA certification form. The FMLA form only requests information relating to the particular serious health condition, as defined in the FMLA, for which the employee is seeking leave. An employer is entitled to know why an employee, who otherwise should be at work, is requesting time off under the FMLA. If the inquiries are strictly limited in this fashion, they would be "job-related and consistent with business necessity" under the ADA.

V.COORDINATION WITH WORKERS' COMPENSATION

Comparison of ADA and Workers' Compensation

The purpose of workers' compensation is to provide a system for securing prompt and fair settlement of employees' claims against employers for occupational injury and illness. Whereas, the purpose of the ADA is to remove barriers which prevent qualified individuals with disabilities from enjoying the same employment opportunities that are available to persons without disabilities.

Whether an injured worker is protected by the ADA will depend on whether or not the person meets the ADA definitions of "an individual with a disability" and "qualified individual with a disability." (See definitions) The fact that an employee is awarded workers' compensation benefits, or is assigned a high workers' compensation disability rating, does not automatically establish that this person is protected by the ADA.

Medical Certification, Inquires and Confidentiality

An employer may not inquire into an applicant's workers' compensation history before making a conditional offer of employment. After making a conditional job offer, an employer may ask about a person's workers' compensation history in a medical inquiry or examination that is required of all applicants in the same job category, it may ask specific individuals to take follow-up examinations and/or answer more questions if they are medically related to the previously obtained medical information.

Early Return-to-Work Program

The State of Nevada has established an Early Return-to-Work Program to enhance recovery, comply with the Americans with Disabilities Act, help minimize workers' compensation costs and to provide a service to employees who are injured or contract an occupational disease in the course and scope of their employment with the State. Employees will be placed in temporary modified duty positions, when feasible, during the course of recovery from an injury or occupational disease that precludes them from performing their normal job tasks. In the event of a permanent disability that prevents an employee from performing the essential functions of their regular position and for which reasonable accommodations cannot be made, every effort will be made to place the employee in an alternative vacant position that they are qualified to perform and that matches their physical limitations. See the Early Return-to-Work Program, A Guide for Managers, Supervisors and Personnel Representatives for additional information. The Risk Management Division serves as a technical resource for the Early Return-to-Work Program. Call (775) 684-8702 for information or assistance.

VI. FORMS AND NOTICE

ESSENTIAL FUNCTIONS DEVELOPMENT

The purpose of this work sheet is to help you conduct an informal job analysis. This process should be completed for each position and reviewed when duties change.

NAC 284.357 requires a hiring authority to provide candidates with a description of the essential functions. In addition, it states that an appointing authority shall consider the essential functions of the position when determining which candidate will be offered employment. Identification of essential functions is also necessary when determining which duties must be accommodated, unless this would cause an undue hardship.

Your analysis will include six factors required by NAC 284.356. For purposes of the Americans with Disabilities Act, a job analysis will be most helpful if it focuses on the results or outcome of a duty not solely on the way it is customarily performed.

Materials Needed:

1. **The specific duties assigned to the position.** There are many good resources available which describe the duties of a position, such as up-to-date Work Performance Standards, NPD-19, Occupational Group Study - Position Description Questionnaire, and information gained from the current incumbent or previous incumbents.
2. **An Essential Functions Job Analysis grid (ADA-1).** An ADA-1 is included in this packet and is also available on the Department of Personnel's website at www.state.nv.us/personnel/forms. If the position you are analyzing is assigned more than eight duties, you will need multiple copies of the ADA-1 form.

Once you have collected the above items, you are ready to conduct an Essential Functions Job Analysis.

Steps to Follow:

1. List and number all duties assigned to the position. (Reminder: Duties are the large categories of work to be accomplished and may consist of multiple tasks. Each position typically consists of 5 to 15 duties.)
2. In the first column of the ADA-1 form, write the number of the duty next to the word "DUTY ____". There should be one row for each duty.
3. Evaluate the first duty in each of the six factor areas on the ADA-1 form. (Please see the attached Explanation of Essential Functions Job Analysis for clarification of factors and examples.)
4. Once you have completed the evaluation for each factor, analyze the responses cumulatively and determine if the duty is an essential function.
5. Repeat steps 3 and 4 for each duty.

Once you have evaluated all of the duties assigned to the position, you will be able to determine which duties are *essential*. All duties not designated as essential are considered marginal and are subject to reasonable accommodation, unless this would cause an undue hardship.

EXPLANATION OF ESSENTIAL FUNCTIONS JOB ANALYSIS

FACTORS TO CONSIDER:

1. **Did previous employees perform this duty?** This may be a new duty not previously assigned, or a duty that has always been assigned to this position. The first consideration is whether an employee in the position actually must perform the function.

For example: A job announcement or job description for a staff support position may state that typing is a function of the job. If, in fact, the employer has never or seldom required previous employees in that position to type, this may not be considered an essential function, unless the position has been re-structured.

2. **Would removing this duty fundamentally alter this position?** Once it has been determined that a person holding this position does perform the function, evaluate the effect of removing the duty from the position.

For example: The ability to type is an essential function for a word processor's job. Removing typing as a duty would fundamentally alter the job.

3. **Does this position exist to perform this duty?** What is the overall purpose of this job, and is this duty an integral part of accomplishing this purpose?

For example: A person is hired as a "floating" supervisor to substitute when regular supervisors on day, night, and graveyard shifts are absent. The only reason this position exists is to have someone who can work on any of the three shifts in place of an absent supervisor. Therefore, the ability to work at any time of day is an essential function of the job.

4. **How many other employees are available to perform this duty?** A function may be considered essential based on the number of other employees available to perform that task or among whom the responsibility for the task can be distributed. With a small work force, the need to perform several tasks is more critical than with a larger staff, where work can usually be redistributed with less impact.

For example: It may be an essential function for a file clerk to answer the telephone if there are only three employees in a very busy office and each employee has to perform many different tasks.

5. **Is this duty so specialized that it requires a high degree of expertise?** This question addresses the level of expertise required to perform the duty. Some duties may require a particular licensure or registration. Others may require a number of years of experience in a specialized field in order to attain the necessary level of proficiency. The level of expertise required can be a determining factor when identifying essential functions.

For example: A person is hired to be an Accountant and is required to be licensed as a Certified Public Accountant (CPA). A duty which requires licensure as a CPA is an essential function of the job.

6. **Percent of time spent performing duty?** Typically those duties that comprise a substantial percentage of time are considered essential to the job. However, a duty that is performed infrequently may be essential because serious consequences would occur if it were not performed.

For example: A firefighter may only occasionally have to carry a heavy person from a burning building, but being able to perform this function would be essential to the firefighter's job.

CONCLUSION:

Is this an essential or marginal function? Using the above information, determine whether the duty is an essential or marginal function.

ESSENTIAL FUNCTIONS JOB ANALYSIS

Agency: _____

Budget Account Number: _____

Position Control Number: _____

DUTY NUMBER	FACTORS						CONCLUSION
	1. Did previous employees perform this duty?	2. Would removing this duty fundamentally alter this position?	3. Does this position exist to perform this duty?	4. How many other employees are available to perform this duty?	5. Is this duty so specialized that it requires a high degree of expertise or skill?	6. Percent of time spent performing duty?	Is this an essential or marginal function?
	YES / NO	YES / NO	YES / NO	NUMBER	YES / NO	TIME PERCENTAGE	ESSENTIAL / MARGINAL
DUTY ____							
DUTY ____							
DUTY ____							
DUTY ____							
DUTY ____							
DUTY ____							
DUTY ____							
DUTY ____							

ESSENTIAL FUNCTIONS

CLASS TITLE: _____

BUDGET ACCOUNT NO.: _____ POSITION CONTROL NO.: _____

DATE PREPARED: _____

INTERVIEWER: _____

Can you perform these essential functions with or without reasonable accommodation?

☐ YES

☐ NO

CANDIDATE'S SIGNATURE: _____

DATE: _____

Rev.: 9/4/96
ADA-03